STATE OF MICHIGAN

COURT OF APPEALS

WENDY CLAIRE WILSON,

Plaintiff-Appellant,

v

MACOMB COMMUNITY COLLEGE,

Defendant-Appellee.

UNPUBLISHED
February 14, 2006

No. 257020
Macomb Circuit Court
LC No. 2003-000831-NZ

Before: Donofrio, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

In this case alleging gender discrimination and retaliation brought pursuant to Michigan's Civil Rights Act, MCL 37.2101, *et seq.*, plaintiff appeals as of right the trial court's order granting summary disposition in defendant's favor. We affirm.

Because the trial court looked beyond the pleadings in deciding the motion, we treat the motion as having been granted under MCR 2.116(C)(10). *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). We review de novo a trial court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence submitted by the parties, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002).

Proof of discriminatory treatment in violation of MCL 37.2202(1)(a) may be established by direct or indirect evidence. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003). Plaintiff contends that she presented sufficient proof of discriminatory treatment, by both direct and indirect evidence, to survive defendant's motion for summary disposition. We disagree.

In a case involving direct evidence of discrimination, the plaintiff must present "'evidence which if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions.'" *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001), quoting *Jacklyn v Schering-Plough Healthcare Products Sales Corp*, 176 F3d 921, 926 (CA 6, 1999). As direct evidence of gender discrimination, plaintiff cites the following exchange that occurred between her and one of her interviewers, Brian Sauriol:

Defense Attorney:	And what did he ask you?
Plaintiff:	He asked me how I intended to take care of my personal life with small children and a career.
Defense Attorney:	Okay. Is that the words he used?
Plaintiff:	I believe so, yes . . . .

Sauriol's question, however, does not require the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions. This question, which could have applied equally to a male candidate with a personal life and children, does not discriminate on the basis of gender. The question simply demonstrates an interest in whether plaintiff would be able work the hours necessary to be an effective instructor. Plaintiff's subjective belief in the discriminatory implications of this question, without more, does not establish that unlawful discrimination was a motivating factor in defendant's hiring decision. Thus, plaintiff failed to present any direct evidence of discrimination.

Plaintiff alternatively argues that she set forth sufficient indirect evidence of gender discrimination under the burden shifting approach in *McDonell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). To establish a rebuttable prima facie case of discrimination under the *McDonnell Douglas* approach, a plaintiff must present evidence that "(1) she belongs to a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination." *Hazle, supra* at 463. When a plaintiff establishes a prima facie case, a presumption of discrimination arises. *Id.*

Plaintiff cites several circumstances surrounding the application process that, though inconsistent or even contradictory, by themselves do not create any inference of discrimination. However, plaintiff contends that these circumstances, in light of Sauriol's question and the fact that she was a woman and the candidate ultimately chosen was a man, create an inference of unlawful discrimination. As discussed above, the nature of Sauriol's question was not discriminatory nor does it even create an inference of unlawful discrimination. Furthermore, an inference of unlawful discrimination does not arise merely because an employer has chosen between two qualified candidates. *Hazle, supra* at 471. Thus, plaintiff has failed to set forth sufficient evidence supporting the fourth element of a prima facie case of discrimination by indirect evidence.[1]

[1] Plaintiff also argues that the circuit court erred by requiring plaintiff to demonstrate that she was *more* qualified for the teaching position than the male hired for the position. However, the trial court did not so rule. In making the statement of which plaintiff complains, the trial court was simply summarizing plaintiff's arguments.

Because plaintiff failed to present either direct evidence of gender discrimination or indirect evidence giving rise to a presumption of gender discrimination, the trial court did not err in granting summary disposition of plaintiff's gender discrimination claim.

Plaintiff also contends that the circuit court erred by dismissing her retaliation claim. We disagree. To establish a prima facie case of unlawful retaliation under the Civil Rights Act, a plaintiff must show: "'(1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action.'" *Garg v Macomb Mental Health*, 472 Mich 263, 273; 696 NW2d 646 (2005), quoting *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).

Under MCL 37.2701(a) a person engaged in protected activity if they "opposed a violation of the act" or "made a charge, filed a complaint, testified, assisted or participated in an investigation, proceeding, or hearing under this act." Plaintiff alleged that defendant did not give her the promotion she sought and did not assign her any other classes after she engaged in protected activity. However, at the time these alleged adverse employment actions were taken, plaintiff had not yet instituted her claims against defendant. Nor had plaintiff "opposed a violation of the act." In *Barrett v Kirtland Comm College*, 245 Mich App 306, 318-319; 628 NW2d 63 (2001), this Court held that to receive protection under the act, an "employee's charge must clearly convey to an objective employer that the employee is raising the specter of a claim of unlawful discrimination pursuant to the CRA." Plaintiff merely complained to a member of the selection committee stating that she "couldn't believe" Sauriol asked her the question at issue. This single, brief, and "generic non-sex-based" complaint does not constitute an overt stand in opposition to a violation of the act. *Id.* at 319. Because plaintiff failed to present any evidence the she was engaged in a protected activity, the trial court did not err in dismissing her retaliation claim.

Affirmed.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ Kirsten Frank Kelly